

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1339
OFFERED BY MR. DUNCAN OF TENNESSEE**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Freedom from Govern-
3 ment Competition Act of 2018”.

4 SEC. 2. FINDINGS.

5 Congress makes the following findings:

6 (1) Private sector business concerns, which are
7 free to respond to the private or public demands of
8 the marketplace, constitute the strength of the
9 United States economic system.

10 (2) Competitive private enterprises are the most
11 productive, efficient, and effective sources of goods
12 and services.

13 (3) Unfair Government competition with the
14 private sector of the economy is detrimental to the
15 United States economic system.

16 (4) Unfair Government competition with the
17 private sector of the economy is at an unacceptably
18 high level, both in scope and in dollar volume.

1 (5) Current law and policy have failed to ad-
2 dress adequately the problem of unfair Government
3 competition with the private sector of the economy.

4 (6) It is in the public interest that the Federal
5 Government establish a consistent policy to rely on
6 the private sector of the economy to provide goods
7 and services necessary for or beneficial to the oper-
8 ation and management of Federal agencies and to
9 avoid unfair Government competition with the pri-
10 vate sector of the economy.

11 **SEC. 3. PUBLIC-PRIVATE COMPETITIVE SOURCING ANAL-**
12 **YSIS REQUIRED BEFORE CONVERSION TO**
13 **CONTRACTOR PERFORMANCE.**

14 (a) IN GENERAL.—Section 1710 of title 41, United
15 States Code, is amended to read as follows:

16 **“§ 1710. Public-private competitive sourcing analysis**
17 **required before conversion to contractor**
18 **performance**

19 “(a) POLICY.—In the process of governing, the Fed-
20 eral Government should not compete with its citizens. The
21 competitive enterprise system, characterized by individual
22 freedom and initiative, is the primary source of national
23 economic strength. In recognition of this principle, it has
24 been and continues to be the general policy of the Federal
25 Government—

1 “(1) to rely on commercial sources to supply
2 the goods and services the Government needs;

3 “(2) to refrain from providing a good or service
4 if procurement of the good or service from a com-
5 mercial source would provide the best value to the
6 Government; and

7 “(3) to use Federal employees to perform inher-
8 ently governmental functions (as defined in section
9 5 of the Federal Activities Inventory Reform Act of
10 1998 (Public Law 105–270; 112 Stat. 2384)).

11 “(b) GENERAL RULE.—Except as provided in sub-
12 section (c), the head of an agency shall periodically con-
13 duct a public-private competitive sourcing analysis with re-
14 spect to each agency function performed by agency em-
15 ployees to determine whether to convert the performance
16 of the function to performance by a contractor.

17 “(c) EXCEPTIONS.—Subsection (b) shall not apply to
18 any function that—

19 “(1) is required by law to be performed by
20 agency employees; or

21 “(2) the head of an agency determines, and
22 submits to Congress notice of such determination,
23 the performance of which by agency employees is—

24 “(A) in the national security interests of
25 the United States; or

1 “(B) is critical to the mission of the agen-
2 cy, or is an inherently governmental function,
3 and in the public interest.

4 “(d) PUBLIC-PRIVATE COMPETITIVE SOURCING
5 ANALYSIS.—(1) The head of an agency shall conduct a
6 public-private competitive sourcing analysis under sub-
7 section (b) pursuant to applicable procedures issued by the
8 Director of the Office of Management and Budget under
9 subsection (e).

10 “(2)(A) If, pursuant to such an analysis conducted
11 under subsection (b), the head of an agency determines
12 that the conversion of the performance of an agency func-
13 tion performed by agency employees to performance by a
14 contractor will provide the best value to the Government,
15 except as provided in subparagraph (B), the head of such
16 agency shall enter into a contract with an entity in the
17 private sector for the performance of such function using
18 competitive procedures, as defined in section 152 of this
19 title.

20 “(B) The head of an agency may enter into a con-
21 tract for a function referred to in subparagraph (A) that
22 is awarded under procedures other than competitive proce-
23 dures if the head of the agency determines that entering
24 into a contract for such function under such procedures

1 is required or necessary pursuant to another provision of
2 law.

3 “(3) In conducting a public-private competitive
4 sourcing analysis under subsection (b) with respect to an
5 agency function, the head of an agency shall consult with
6 agency employees who could be affected by such analysis.
7 The head of such agency shall consult with such employees
8 during the development of the scope of work subject to
9 the public-private competitive sourcing analysis and shall
10 continue consulting with such employees to ensure that
11 the views of such employees are considered. Such consulta-
12 tions shall be consistent with any applicable guidance
13 issued by the Director of the Office of Management and
14 Budget pursuant to subsection (e)(4).

15 “(e) PROCEDURES AND GUIDANCE.—

16 “(1) GENERAL PROCEDURES.—Not later than
17 180 days after the date of the enactment of the
18 Freedom from Government Competition Act of
19 2018, the Director of the Office of Management and
20 Budget shall issue procedures for agencies on—

21 “(A) notifying Congress on the matters de-
22 scribed in subsection (c)(2); and

23 “(B) conducting a public-private competi-
24 tive sourcing analysis under subsection (b)
25 within a 12-month period.

1 “(2) STREAMLINED PROCEDURES.—Not later
2 than 180 days after the date of the enactment of the
3 Freedom from Government Competition Act of
4 2018, the Director of the Office of Management and
5 Budget shall issue streamlined procedures for agen-
6 cies on conducting, within a 90-day period, a public-
7 private competitive sourcing analysis under sub-
8 section (b). The head of an agency shall use such
9 procedures in the case that—

10 “(A) fewer than 65 full-time agency em-
11 ployees will be involved in such an analysis; or

12 “(B) a substantially similar function has
13 been performed for the agency by both an enti-
14 ty in the private sector and agency employees
15 during the most recent five-year period.

16 “(3) EXTENSION.—In issuing procedures under
17 paragraphs (1)(B) and (2) with respect to con-
18 ducting a public-private competitive sourcing anal-
19 ysis, the Director of the Office of Management and
20 Budget shall provide standards for circumstances
21 under which an agency may have an extended period
22 of time to complete such an analysis.

23 “(4) GUIDANCE.— The Director of the Office
24 of Management and Budget may issue guidance for

1 agencies on consulting with agency employees under
2 subsection (d)(3).

3 “(f) AGENCY DEFINED.—In this section, the term
4 ‘agency’—

5 “(1) means—

6 “(A) an Executive department, as defined
7 in section 101 of title 5; and

8 “(B) an independent establishment, as de-
9 fined in section 104(1) of such title; and

10 “(2) does not include the Department of De-
11 fense.”.

12 (b) CLERICAL AMENDMENT.—The table of sections
13 at the beginning of chapter 17 of such title is amended
14 by amending the item relating to section 1710 to read as
15 follows:

“1710. Public-private competitive sourcing analysis required before conversion to
contractor performance.”.

16 (c) REPEALS; TECHNICAL AND CONFORMING
17 AMENDMENTS.—

18 (1) TITLE 28, UNITED STATES CODE.—Section
19 1491(b)(5) of title 28, United States Code, is
20 amended to read as follows:

21 “(5) If an interested party who is a member of
22 the private sector commences an action described in
23 paragraph (1) with respect to a public-private com-
24 petitive sourcing analysis conducted under section

1 1710 of title 41 or section 2461 of title 10 regarding
2 the performance of a function of a Federal agency,
3 or a decision to convert a function performed by
4 Federal civilian employees to private sector perform-
5 ance, then an interested party described in section
6 3551(2)(B) of title 31 shall be entitled to intervene
7 in that action.”.

8 (2) TITLE 31, UNITED STATES CODE.—Chapter
9 35 of title 31, United States Code, is amended—

10 (A) by amending subparagraph (B) of sec-
11 tion 3551(2) to read as follows:

12 “(B) with respect to a public-private com-
13 petitive sourcing analysis conducted under sec-
14 tion 1710 of title 41 or section 2461 of title 10
15 with respect to the performance of a function of
16 a Federal agency, or a decision to convert a
17 function performed by Federal civilian employ-
18 ees to private sector performance, includes—

19 “(i) any official who is responsible for
20 submitting the agency proposal or bid
21 under either such section; and

22 “(ii) any one individual who, for the
23 purpose of representing the Federal civil-
24 ian employees engaged in the performance
25 of such function for which the public-pri-

1 vate competitive sourcing analysis is con-
2 ducted in a protest under this subchapter
3 that relates to such analysis, has been des-
4 ignated as the agent of the Federal civilian
5 employees by a majority of such employ-
6 ees.”;

7 (B) in section 3552(b)—

8 (i) by striking “tender” each place it
9 appears;

10 (ii) by striking “public-private com-
11 petition” each place it appears and insert-
12 ing “public-private competitive sourcing
13 analysis”; and

14 (iii) by striking “the performance of
15 the activity or function” and inserting “the
16 performance of the function”;

17 (C) in section 3553(g)—

18 (i) by striking “a public-private com-
19 petition described in section 3551(2)(B) of
20 this title” and inserting “a public-private
21 competitive sourcing analysis described in
22 section 3551(2)(B) of this title”; and

23 (ii) by striking “the performance of
24 the activity or function subject to the pub-
25 lic-private competition” and inserting “the

1 performance of the function subject to the
2 public-private competitive sourcing anal-
3 ysis”;

4 (D) in section 3554(b)(1)(C), by striking
5 “public-private competition conducted” and all
6 that follows through “successor circular” and
7 inserting “public-private competitive sourcing
8 analysis conducted under section 1710 of title
9 41 or section 2461 of title 10”; and

10 (E) by striking section 3557 and the item
11 relating to such section in the table of sections
12 at the beginning of such chapter.

13 (3) FINANCIAL SERVICES AND GENERAL GOV-
14 ERNMENT APPROPRIATIONS ACT, 2008.—Effective
15 on the date that is one year after the date of the en-
16 actment of this Act, section 739 of the Financial
17 Services and General Government Appropriations
18 Act, 2008 (division D of Public Law 110–161; 121
19 Stat. 2029; 31 U.S.C. 501 note) is repealed.

20 (4) FINANCIAL SERVICES AND GENERAL GOV-
21 ERNMENT APPROPRIATIONS ACT, 2010.—Effective
22 on the date that is one year after the date of the en-
23 actment of this Act, section 743 of the Financial
24 Services and General Government Appropriations

1 Act, 2010 (division C of Public Law 111–117; 123
2 Stat. 3218; 31 U.S.C. 501 note) is repealed.

3 (d) EFFECTIVE DATE.—Except as otherwise pro-
4 vided, the amendments made by this section shall take ef-
5 fect on the date that is one year after the date of the en-
6 actment of this Act.

7 **SEC. 4. CONVERSION OF DEPARTMENT OF DEFENSE FUNC-**
8 **TIONS PURSUANT TO PUBLIC-PRIVATE COM-**
9 **PETITIVE SOURCING ANALYSES.**

10 (a) PUBLIC-PRIVATE COMPETITIVE SOURCING ANAL-
11 YSES.—

12 (1) IN GENERAL.—Section 2461 of title 10,
13 United States Code, is amended to read as follows:

14 **“§ 2461. Public-private competitive sourcing analyses**

15 “(a) IN GENERAL.—Except as provided in subsection
16 (b), for each Department of Defense function performed
17 by Department of Defense civilian employees, the Sec-
18 retary of Defense shall periodically conduct a public-pri-
19 vate competitive sourcing analysis to determine whether
20 to convert the performance of the function to performance
21 by a contractor.

22 “(b) EXCEPTIONS.—Subsection (a) shall not apply to
23 any function that—

1 “(1) the Secretary determines is required by
2 law to be performed by Department of Defense civil-
3 ian employees; or

4 “(2) the Secretary determines, and submits to
5 Congress notice of such determination, the perform-
6 ance of which by Department of Defense civilian em-
7 ployees is—

8 “(A) in the national security interests of
9 the United States; or

10 “(B) is critical to the mission of the De-
11 partment of Defense, or is an inherently gov-
12 ernmental function, and in the public interest.

13 “(c) PUBLIC-PRIVATE COMPETITIVE SOURCING
14 ANALYSIS.—(1) The Secretary shall carry out a public-
15 private competitive sourcing analysis under this section
16 pursuant to procedures issued by the Office of Manage-
17 ment and Budget under section 1710 of title 41.

18 “(2)(A) If, pursuant to such an analysis conducted
19 under subsection (a), the Secretary determines that the
20 conversion of the performance of a function performed by
21 Department of Defense civilian employees to performance
22 by a contractor will provide the best value to the Govern-
23 ment, except as provided in subparagraph (B), the Sec-
24 retary shall enter into a contract with an entity in the
25 private sector for the performance of such function using

1 competitive procedures, as defined in section 2302 of this
2 title.

3 “(B) The Secretary may enter into a contract for a
4 function referred to in subparagraph (A) that is awarded
5 under procedures other than competitive procedures if the
6 Secretary determines that entering into a contract for
7 such function under such procedures is required or nec-
8 essary pursuant to another provision of law.

9 “(3) In conducting a public-private competitive
10 sourcing analysis under this section with respect to a De-
11 partment of Defense function, the Secretary shall consult
12 with Department of Defense civilian employees who could
13 be affected by such analysis. The Secretary shall consult
14 with such employees during the development of the scope
15 of work subject to the public-private competitive sourcing
16 analysis and shall continue consulting with such employees
17 to ensure that the views of such employees are considered.
18 Such consultations shall be consistent with any applicable
19 guidance issued by the Office of Management and Budget
20 pursuant to section 1710 of title 41.

21 “(d) DEFINITIONS.—In this section:

22 “(1) The term ‘public-private competitive
23 sourcing analysis’ has the meaning given such term
24 in the procedures issued by the Office of Manage-

1 ment and Budget pursuant to section 1710 of title
2 41.

3 “(2) The term ‘inherently governmental func-
4 tion’ has the meaning given that term in the Federal
5 Activities Inventory Reform Act of 1998 (Public
6 Law 105-270; 31 U.S.C. 501 note).”.

7 (2) CLERICAL AMENDMENT.—The table of sec-
8 tions at the beginning of chapter 146 of such title
9 is amended by striking the item relating to section
10 2461 and inserting the following new item:

 “2461. Public-private competitive sourcing analyses.”.

11 (b) CONFORMING AMENDMENTS.—Such title is fur-
12 ther amended—

13 (1) in section 2461a—

14 (A) in subsection (a)—

15 (i) in paragraph (1) by striking “pub-
16 lic-private competition” and inserting
17 “public-private competitive sourcing anal-
18 ysis”; and

19 (ii) in paragraph (2)(B), by striking
20 “public-private competition” both places it
21 appears and inserting “public-private com-
22 petitive sourcing analysis”; and

23 (B) in subsection (b), by striking “public-
24 private competitions” and inserting “public-pri-
25 vate competitive sourcing analyses”;

1 (2) in section 2463—

2 (A) in subsection (b)—

3 (i) in paragraph (1)—

4 (I) by striking subparagraph (C);

5 and

6 (II) by redesignating subpara-

7 graphs (D) through (F) as subpara-

8 graphs (C) through (E), respectively;

9 and

10 (ii) in paragraph (2) by striking “or is

11 a function closely associated with the per-

12 formance of an inherently governmental

13 function”;

14 (B) by striking subsection (c);

15 (C) by redesignating subsections (d)

16 through (g) as subsections (c) through (f), re-

17 spectively;

18 (D) in subsection (d)(1), as so redesign-

19 nated—

20 (i) in subparagraph (A), by inserting

21 “and” after the semicolon;

22 (ii) in subparagraph (B), by striking

23 the semicolon and inserting a period; and

24 (iii) by striking subparagraph (C);

25 and

1 (E) in subsection (f), as so redesignated—

2 (i) by striking paragraph (1); and

3 (ii) by redesignating paragraphs (2)

4 and (3) as paragraphs (1) and (2), respec-

5 tively;

6 (3) in section 129a(e)(2), by striking “relating

7 to public-private competition required before conver-

8 sion to contractor performance” and inserting “re-

9 lating to public-private competitive sourcing anal-

10 yses”; and

11 (4) in section 2679(d), by striking “public-pri-

12 vate competitions” and inserting “public-private

13 competitive sourcing analyses”.

14 (c) REPEAL OF TEMPORARY SUSPENSION OF PUB-

15 LIC-PRIVATE COMPETITIONS FOR CONVERSION OF DE-

16 PARTMENT OF DEFENSE FUNCTIONS TO PERFORMANCE

17 BY A CONTRACTOR.—Effective on the date that is one

18 year after the date of the enactment of this Act, section

19 325 of the National Defense Authorization Act for Fiscal

20 Year 2010 (Public Law 111–84; 123 Stat. 2253) is re-

21 pealed.

22 (d) REPEAL OF MORATORIUM ON CONVERSION TO

23 CONTRACTOR PERFORMANCE OF DEPARTMENT OF DE-

24 FENSE FUNCTIONS AT MILITARY MEDICAL FACILITIES.—

25 Effective on the date that is one year after the date of

1 the enactment of this Act, section 1676 of the National
2 Defense Authorization Act for Fiscal Year 2008 (Public
3 Law 110–181; 10 U.S.C. 1071 note) is repealed.

4 (e) EFFECTIVE DATE.—The amendments made by
5 this section shall take effect on the date that is one year
6 after the date of the enactment of this Act.

7 **SEC. 5. REPORT.**

8 Not later than four years after the date of the enact-
9 ment of this Act, the Director of the Office of Manage-
10 ment and Budget shall submit to Congress a report on
11 the implementation of the requirements of section 1710
12 of title 41, United States Code, as amended by section
13 3(a), and section 2461 of title 10, as amended by section
14 4(a). The report shall include—

15 (1) the number of public-private competitive
16 sourcing analyses that have been conducted under
17 such section 1710 and such section 2461 and the re-
18 sults of any such analyses; and

19 (2) an evaluation of the justification for exemp-
20 tions under such section 1710 and such section
21 2461.

